

The Administrative Law Judge held that claimant did not sustain increased "disability" as a result of his January 7, 1994 back injury and, therefore, the Workers Compensation Fund was not required to reimburse the respondent any portion of the \$30,000 lump sum settlement amount paid to claimant. However, the Judge did order the Workers Compensation Fund to reimburse respondent the amounts paid in temporary total

and medical benefits. The only issue before the Appeals Board is the liability of the Workers Compensation Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be modified.

The respondent and claimant entered into a settlement agreement wherein claimant received a \$30,000 lump sum payment to extinguish all rights he might have under the Kansas Workers Compensation Act for an alleged January 7, 1994 work-related accident. The settlement amount exceeded the permanent partial disability benefits claimant would be entitled to receive for a functional impairment because it took into consideration the potential for both costly future medical expense and a high work disability. At the settlement hearing before the Administrative Law Judge, the Workers Compensation Fund did not stipulate to the reasonableness of the lump sum settlement amount but, instead, reserved all rights and issues.

The Workers Compensation Act provides that the Workers Compensation Fund shall pay all or a portion of the award to an injured employee for accidents arising before July 1, 1994 when the respondent has either knowingly hired or retained a handicapped employee and a preexisting impairment either caused or contributed to the resulting injury or resulting disability. See K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a). In the absence of stipulation, the liability of the Workers Compensation Fund becomes another issue to be decided by the administrative law judge.

The Administrative Law Judge found that claimant would not have injured his back in January 1994 "but for" his preexisting low back condition and that the respondent retained claimant in its employ with knowledge of his preexisting impairment and handicap. The Appeals Board agrees with the Administrative Law Judge and adopts those conclusions as they are supported by the greater weight of the evidence.

The issue now directly before us is the liability of the Workers Compensation Fund when the Fund at claimant's settlement hearing did not stipulate to the reasonableness of the settlement amount or the nature and extent of claimant's disability. The Appeals Board finds that the legislature did not intend the Workers Compensation Fund to reimburse respondents and their insurance carriers for amounts in excess of the medical and disability benefits that were actually due or incurred. Otherwise, the respondent and its insurance carrier could receive a windfall. Therefore, the Appeals Board finds that in the absence of a stipulation by the Workers Compensation Fund, the Fund is responsible to reimburse the respondent and its insurance company only those monies respondent can establish that claimant was due or would have received if the case had been litigated to an award.

Because the respondent and Fund did not stipulate to the nature and extent of claimant's disability, that became an issue to be determined by the administrative law judge and, thus, is an issue for the Appeals Board. The Appeals Board finds that claimant reinjured his low back on January 7, 1994, while working for the respondent and now has a 10 percent whole body functional impairment as a result of that accident. The Appeals Board also finds that before the January 1994 accident claimant had a 5 percent whole

body functional impairment due to his low back which he had earlier injured in 1990 and had undergone a laminectomy and discectomy at the L5-S1 intervertebral space. These conclusions are based on the testimony of Guillermo Garcia, M.D., who treated claimant for both the 1990 and 1994 accidents. After treating claimant for the 1990 accident, Dr. Garcia released claimant to return to work as a truck driver without restrictions. Although the doctor admits that one of the tables in the AMA Guides indicates claimant may have had a 10 percent whole body functional impairment after the 1990 injury, Dr. Garcia testified that if someone had asked him he would have given claimant a 5 percent whole body functional impairment rating for that injury. Further, the greater weight of the evidence supports the conclusion that claimant has sustained additional injury and impairment as a result of the 1994 injury because he is now far more symptomatic than before the accident and Dr. Garcia has placed additional restrictions on his activities. Based upon the whole record, the Appeals Board finds claimant's whole body functional impairment following the 1990 accident was minimal due to his relatively asymptomatic condition and, more probably than not, in the range of 5 percent.

Because his was an "unscheduled" injury, claimant's right to permanent partial disability benefits for the January 1994 accident was governed by K.S.A. 44-510e, which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Also, K.S.A. 44-501(c) provides in pertinent part:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

When he was deposed in November 1994, claimant testified he was earning approximately \$400 per week driving a dump truck for a different employer in Colorado. Claimant also testified he thought he would lose his overtime hours and eventually be laid off as business decreased over the winter months.

Based upon the above, the Appeals Board finds that claimant was earning more than 90 percent of his pre-injury average weekly wage of \$420 and, therefore, was entitled, as of the date of settlement hearing, to permanent partial disability benefits based upon his functional impairment rating. Based upon that conclusion, the Appeals Board finds that the Workers Compensation Fund should reimburse the respondent and its insurance

carrier for the 5 percent increase in functional impairment caused by the January 1994 accident.

The respondent's request for reimbursement for work disability and medical expense, which has not yet occurred or proven to have occurred, is premature. Should claimant's circumstances change to either establish a work disability or that claimant has incurred additional medical expense for which respondent would have been responsible, the proper remedy for the respondent is to file a request for review and modification of this Award under K.S.A. 44-528 to request additional reimbursement.

Based upon the above, the Workers Compensation Fund is to reimburse the respondent and its insurance carrier \$5,801.81 which represents the 5 percent increase in functional impairment and claimant's entitlement to permanent partial disability benefits, along with \$4,359.76 for temporary total disability benefits and \$8,607.85 for medical expenses. Adding those numbers together, the Appeals Board finds that the Workers Compensation Fund should, at this time, reimburse the respondent and its insurance carrier the sum of \$18,769.92.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated February 12, 1996, should be, and hereby is, modified. The Workers Compensation Fund is hereby ordered to reimburse the respondent and its insurance carrier the sum of \$18,769.42, which represents a 5% permanent partial general disability, temporary total disability benefits, and medical expense incurred to date.

The respondent and the Workers Compensation Fund are each assessed one-half of the expenses as set forth in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James M. McVay, Great Bend, KS.  
Kent Roth, Great Bend, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director